NTEU
NATIONAL TERTIARY EDUCATION UNION

WHAT'S UP!

NTEU at NMMU

The Common Law Contract of Employment : Part 2.

Continuing with the theme in an earlier What's Up, of employees making their services available, it means that punctuality and arriving at work on time every day and not leaving before the end of the work day, is required. Furthermore, employees are supposed to spend most of their time working at their workstation, performing their duties. Frequent disappearance to go to the bathroom, or to chat with colleagues, or to smoke places one in breach of the requirement that employees must make their services available. The point is that late arrival, early departure and frequent absence from one's workstation constitute misconduct.

The extract below from an employment contract illustrates how seriously some organisations take the need for employees to make their services available. Included in the employment contract is the following:

"You undertake to devote all time and attention during normal business hours and, to the extent that it is required, such additional hours as the needs of the institution's operations may require, to your job in order to ensure that the objectives contained in this agreement are duly attained and achieved."

The next duty of employees in terms of the Common Law Contract of employment is to work competently. Another extract from the contract of employment referred to above, reads as follows:

"You undertake to perform all such duties as may be assigned, in a diligent, proper and satisfactory manner and in accordance with the expectation of this institution."

This illustrates that some organisations do not solely rely on the common law, but actually build the common law principles into their formal contracts of employment to ensure compliance by their employees.

A further extract from the employment contract referred to above illustrates this.

"You undertake to observe and comply with all regulations and directives made or given by Council, relevant management or person authorised thereto."

The employee is left in no doubt as to what is expected.

The expectation that employees must work competently may be obvious, but observing what one reads in the news, it seems that there are many people in important positions who are incompetent. That is unacceptable as it costs the economy dearly.

When employees do not perform their duties competently, the employer has the right to take corrective action which includes the following:

- Counselling to establish why the employee is not working competently.
- Having established the reason, an agreement (with timeline)is reached as to what needs to be done to improve performance.
- The performance improvement action planned is implemented.
- After an agreed time the performance is reviewed to determine if there has been an improvement.

No improvement could result in disciplinary action.

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Using cost to company and overstaffing as retrenchment criteria

Section 189 of the Labour Relations Act, No 66 of 1995 (Act) regulates the retrenchment of employees, with the emphasis on the retrenchment procedure as opposed to the substance of a proposed retrenchment of employees. The Act does not provide selection criteria for proposed retrenchments but requires parties to consult with a view of reaching agreement thereon.

As most retrenchments are for economic reasons, many employers prefer the cost to company selection criterion. Notwithstanding the above, the employer must show that the retrenchment is both substantively and procedurally fair.

The court in Food And Allied Workers Union and Others v Cape Hospitality Services (Pty) Ltd t/a Savoy Hotel (C419/2007) [2015] ZALCCT 51 (18 August 2015) 35 ILJ 3394 LC was faced with a question of unfair retrenchment on the basis that there was no consultation with the affected employees, nor with their trade union, and the selection criteria was not justifiable.

The employees sought reinstatement. The employer had retrenched them on the basis that it was necessary to cut costs in the business. It must be noted that at the time of retrenchment the employees earned less than R3000 per month. The employer alleged that it held a meeting with the employees but not with the trade union (FAWU) because the union did not have majority membership. At the meeting, the employer claimed to have explained the financial position of the company and the possibility of retrenchments. The employer adopted cost to company and being overstaffed as the selection criteria.

The court interrogated all the above issues and held that the notion that the retrenchment of two employees who earned less than R3000 per month was critical to the operational costs of the company was unconvincing.

The court also held that the understanding that an employer has a duty to only consult with the union which has majority membership is incorrect in law. In line with the hierarchy of consultation provided in s189(1)(b)(ii) of the Act, in the absence of a collective agreement and a workplace forum, the employer is required to consult with the registered trade union whose members are likely to be affected by the proposed dismissals. The union in question, FAWU, had long since been recognised as a representative union and the employer was obliged to consult with it.

Turning to the selection criteria, the employer adopted cost to company and being overstaffed as the criteria. On the point of cost to company, the court looked at the fact that the employees were only earning R3000 per month. On the point of being overstaffed, the court looked at the fact that the employer was advertising for a chef in the same department where the employees were dismissed.

The court found the retrenchment to be both procedurally and substantively unfair as there was no evidence to prove the meeting with the employees took place and because the selection criteria was not justifiable; the court ordered reinstatement with back-pay.

Although LIFO is the most commonly chosen selection criterion, the cost to company and being overstaffed criteria are acceptable but only if they are justifiable on the facts and such criteria must be a result of a joint-consensus seeking process between the employer and the consulting parties as contemplated by s189(2)(b) of the Act. These criteria cannot be adopted unilaterally by the employer as this would result in procedural unfairness.

SOURCE: http://www.labourguide.co.za/most-recent/2142-using-cost-to-company-and-overstaffing-as-retrenchment-criteria?utm_source=MailingList&utm_medium=email&utm_campaign=links%2F+no+ads

There is no passion to be found in playing small – in settling for a life that is less than the one you capable of living

Nelson Mandela